

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1303

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- v -

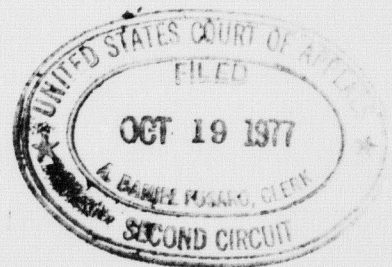
ALPHONSE RICE,

Defendant-Appellant.

On Appeal From The United States District
Court
For The Southern District Of New York

APPENDIX

LEONARD J. LEVENSON, ESQ.
Attorney for Defendant
11 Park Place
New York, N. Y. 10007



PAGINATION AS IN ORIGINAL COPY

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0208 1

0852

RICE, ALPHONSE

Case Filed

Mo / Day

02/16

77

0125

01

No. of Defs

* 01

JUVENILE

U.S. MAG
CASE NO

BAIL • RELEASE

Denied

AMT

Fugitive

Set

Pers. Recog

PSA

\$

000

Conditions

Date

10% Deposit

Bail Not Made

Surety Bond

Status Changed

Collateral

3rd

Prty Cust

Other

U.S. TITLE/SECTION

18:371

18:285

18:1001

OFFENSES CHARGED

ORIGINAL COUNTS

Consp. to defraud Veteran's Administration
Unlawfully taking files belonging to V.A.
False statements on application for V.A.
benefits

1

2

3

KEY DATES & INTERVALS

ARREST or

S. Custody Began

INDICTMENT X

Information

2-16-77

ARRAIGNMENT

2-24-77

TRIAL

Trial Set For

2-24-77

1st Plea

2-24-77

Final Plea

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Immons Served

Indict Waived

Superseding

Indict Info

In Charging

District

First Appearance

Date

Initial/No

Outcome

Dismissed

Held for GJ or other pro

ceeding in this district

Held for GJ or other pro

ceeding in district below

Waived

Not Waived

Intervening Indictment

Tape Number

Complaint

Offense

(In Complaint)

S. Attorney or Asst

Allen R. Bentley

791-1929

ATTORNEYS

Defense X A Ret Waived Self None / Other PD ECD

Martin E. Gotkin

250 W. 57th St.

New York, N.Y. 10019

Tel: 541-8390

Show last names and suffix numbers of other defendants on same indictment/information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
2-16-77		Filed Indictment.....Tenney, J.	
2-22-77		Filed the following Magistrate papers: Docket entry sheet, Annot. of Counsel & Fin. Affdvt. (Legal Aid).	
2-24-77		Def't. (atty. Martin Gotkin present) pleads not guilty. Bail \$5,000 PRB continued. Ordered F/P. Case assigned to Briant, J. for all purposes.....Frankel, J.	
2-25-77		Filed Gov't's Notice of readiness for trail .	
3-1-77		Filed NOTICE OF APPEARANCE , of Martin E. Gotkin, 250 W. 57th St. N.Y.N.Y. 10019. Tel: 541-8390.	
3-7-77		Filed Appearance Bond in the sum of \$5,000.00. Unsecured. Dtd 3-3-77. Clerk.	
3-15-77		Filed NOTICE OF MOTION foran order dismissing the indictment. RET: 3-18-77.	
3-15-77		Def't's MEMORANDUM in support of his motion to dismiss the indictment for pre-indictment delay.	

AQ 26.

Cont'd on page 2

Clerk of the Court

Filed Govt's Memorandum of law in opposition to deft's motion to dismiss the indictment.

Filed Govt's AFFIDAVIT of Allen R. Bentley, in opposition to deft's motion to dismiss the indictment.

Deft. (atty Present) Deft's motion to dismiss indictment argued. Decision Reserved. Time tolled Sect. G of Speedy Trial Act. So ordered, Brieant, J.

Filed MEMORANDUM AND ORDER on motion filed 3-18-77. Motion denied. This case set down for trial on 4-18-77. So ordered BRIEANT, J. m/n.

Filed Govt's Requests to charge.

Filed REQUESTS ON VOIR DIRE., filed by deft's counsel.

Jury Trial begun.

Trial Cont'd.

Trial Cont'd.

Trial Cont'd and concluded. Jury verdict GUILTY on Cts. 1 & 3. Not Guilty on ct. 2. P.S.I. Sent. adj'd until 6-2-77. BRIEANT, J.

Filed CJA 21 Authorization & voucher for Expert or other services. Copies 2 & 5.

Filed transcript of record of proceedings, dated 3-18-77

Deft (atty Pres) Sentence adj'd until 6-10-77 Bail cont'd, BRIEANT, J.

Filed Deft's SENTENCING MEMORANDUM.

Filed MEMORANDUM attached to vouchers #310632 and #138843. ... voucher claims total compensation and disbursements pursuant to the Criminal Justice Act in the amount of \$1,156.50. So ordered BRIEANT, J. m/n

Filed CJA 20 Appointment & voucher for counseling services. Copies 2 & 5.

Filed CJA 20 Appointment & voucher for counseling services. Copy 2.

Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - The deft is committed to the custody of the Atty Gen for impr for a period of NINE (9) MONTHS oneach of counts 1 and 3, to run concurrently with each other and concurrently with the probation imposed by Judge Gagliardi. Deft cont'd on present bail pending the posting of bail fixed for appeal in the amount of \$5,000.00 Unsecured Personal Recognizance Bond. BRIEANT, J. (all copies issued).

Filed Deft's NOTICE OF APPEAL to the USCA from the Final Judgment dated 6-10-77. Mailed Notices to the US atty and the Counsel for the appellant.

Filed MEMO-ENDORSED on deft's letter dated 5-26-77 for an order reducing sentence. MOTION DENIED, MAC MAHON, J. m/nz

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C D NUMBER	DATE	RECEIPT NUMBER	C D NUMBER
				A TRUE COPY	
				RAYMOND E. BURGHARDT, Clerk	

By Raymond E. Burghardt
Deputy Clerk

BEST COPY AVAILABLE

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Raymond E. Burghardt
Clerk of the Court

Wido

-3208

-1235

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

ALPHONSE RICE,

Defendant.

INDICTMENT

77 Cr. 125

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, ALPHONSE RICE, the defendant, Landis C. Dothard, named herein as a co-conspirator but not as a defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with each other to defraud the United States and an agency thereof, namely, the United States Veterans Administration ("the VA") and to commit certain offenses against the United States, namely, violations of Sections 285 and 1001 of Title 18, United States Code.

2. It was a part of said conspiracy that the defendant and his co-conspirators, being employees of the VA, would and did misuse their official positions and their knowledge of VA procedures to procure for themselves, and for each other, VA educational benefits to which they were not lawfully entitled.

A-3

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3. It was a further part of said conspiracy that the defendant and his co-conspirators, to facilitate, and to prevent detection of, the fraud alleged in this indictment, would and did take and carry away without authority from the place where they were filed, deposited and kept by authority of the United States, documents, records, files and papers prepared and intended to be used and presented to procure the payment of money from and by the United States and its officers, employees and agents and the allowance and payment of claims.

4. It was a further part of said conspiracy that the defendant and his co-conspirators, to effectuate said fraudulent procurement of VA benefits, would and did falsify, conceal and cover up material facts by tricks, schemes and devices, and make false, fictitious and fraudulent statements and representations in matters within the jurisdiction of the VA.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about April 15, 1974, co-conspirator Landis C. Dothard signed a form certifying his continued eligibility for VA educational benefits and submitted it to the VA New York Regional Office, 252 Seventh Avenue, New York, New York.

2. On or about September 25, 1974, at 252 Seventh Avenue, New York, New York, the defendant ALPHONSE RICE caused his own claim file to be requisitioned from the Newark, New Jersey, office of the VA.

3. On or about March 26, 1975 in Queens, New York, the defendant ALPHONSE RICE and co-conspirator Landis C. Dothard signed an application submitted to Court Plaza Associates for an apartment at a rental rate of \$464 per month.

4. On or about April 23, 1975, in Queens, New York, the defendant ALPHONSE RICE and co-conspirator Landis C. Dothard signed a rider to a three-year lease on Apartment 2202 at 123-33 83rd Avenue, Queens, New York.

5. On or about May 13, 1975, the defendant ALPHONSE RICE received a United States Treasury check in the amount of \$474.54, representing VA educational benefits for a Veteran, a spouse, and three dependants.

6. On or about May 30, 1975, at 252 Seventh Avenue, New York, New York, the defendant ALPHONSE RICE signed a form authorizing an increase in the rate at which VA educational benefits were paid to co-conspirator Landis C. Dothard, which increase was based on a finding that co-conspirator Landis C. Dothard had two dependents not previously included in the computation of his VA educational benefits.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 30th day of September, 1974, in the Southern District of New York, ALPHONSE RICE, the defendant, unlawfully, wilfully, knowingly and without authority, did take and carry away from the place where

they were filed, deposited and kept by authority of the United States, documents, records, files and papers prepared and intended to be used and presented to procure the payment of money from and by the United States and its officers, employees and agents and the allowance and payment of claims, namely, the VA claim file of ALPHONSE RICE, the defendant.

(Title 18, United States Code, Sections 285 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 30th day of May, 1975, in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, namely, the VA, ALPHONSE RICE, the defendant, by a trick, a scheme and a device, unlawfully, wilfully and knowingly did falsify, conceal and cover up a material fact, namely, that Landis C. Dothard was not entitled to an increase in VA educational benefits by reason of having two dependents not previously included in the computation of his VA educational benefits.

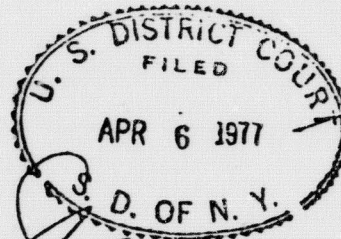
(Title 18, United States Code, Sections 1001 and 2.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

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ORIGINAL



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

77 Cr. 125-CLB

-v-

ALPHONSE RICE,

MEMORANDUM AND ORDER

Defendant.

-X

Bricant, J.

By indictment filed February 16, 1977, Alphonse Rice was charged with conspiracy to defraud the Veterans Administration (the "VA"), an agency of the United States, with removing his VA claim records from that agency's files, and with making false statements and entries in a matter within the jurisdiction of a department or agency of the United States. 18 U.S.C. §§ 371, 285, 1001 and 2.

By motion fully submitted on March 18, 1977, defendant seeks an order, pursuant to Rule 48(b), F.R.Crim.P. dismissing the indictment for unnecessary delay in presenting the charges to the grand jury, or alternatively, on the ground that his Fifth Amendment due process right was violated.

Facts

The following facts are undisputed for purposes of this motion. In July 1975, someone at the VA apparently discovered that

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1976 177

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ORIGINAL

one Dothard, a full-time VA employee, was receiving VA educational benefits for which he was ineligible. In September 1975, both the Investigation and Security Service of the VA and the FBI each launched investigations of the activities of a number of other full-time VA employees who were suspected of receiving educational benefits illegally. Among these other employee-suspects was Alponse Rice, who since May of 1975 had shared an apartment with Dothard in Queens. On September 22, 1975, Rice was interviewed by two FBI agents.

Two days later, on September 24, 1975, after the discovery of a false certification form signed by Dothard, and submitted by him to the VA, Dothard was arrested by the FBI and charged with violating 18 U.S.C. § 1001. However, no false statements or documents of any kind relating to Rice's receipt of benefits could be found. Indeed, Rice's entire VA claim file was missing, and in fact was never located.

On December 19, 1975, a grand jury investigation was begun to determine whether there was probable cause to believe that Rice, Dothard, and the others had committed any federal crimes. On January 19, 1976, Rice was subpoenaed to appear before the Grand Jury on January 26th. This date was adjourned to permit Rice's court-appointed counsel to familiarize himself with the matter. On the adjourned date, February 13, 1976, Rice appeared before the

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grand jury, but on the advice of counsel, he asserted his privilege against self-incrimination and refused to give handwriting exemplars which were requested from him. However, later that same day, Rice was ordered by Judge Motley to provide the exemplars. On February 23, 1976, he complied with Judge Motley's directive and provided the handwriting samples.

These were then turned over to handwriting experts at the VA for comparison with certain documents in the case, including a form apparently signed by Rice authorizing an increase in Dothard's educational benefits on the grounds that the latter had acquired additional dependents. A report from the VA's experts was received by the Assistant United States Attorney on May 6, 1976.

Meanwhile on March 2, 1976, Dothard had been indicted for his part in the scheme, and on June 11, 1976, he pleaded guilty to Count Two of Indictment 76 Cr. 220. Prior to his guilty plea, Dothard had claimed that he was a victim of a "vendetta" carried out by officials at the VA. He asserted that a certain individual at the VA could substantiate his story. Although he did not provide the individual's full name, through its own efforts, the Government was finally able to locate that individual, who appeared before the grand jury on August 5, 1976 pursuant to subpoena. Far from exculpating Dothard, this witness provided further corroboration of the Government's theory that Rice and

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Dothard had removed their claim files, and also revealed that Dothard had made certain statements to her, incriminating Rice in a joint criminal endeavor.

In September and October of 1976, the Government subpoenaed rental agreements pertaining to the apartment shared by Dothard and Rice. By these documents, the Government hoped to show that Rice knew of the fraudulent nature of Dothard's claim when he signed the form authorizing increased educational benefits for Dothard. These records were finally obtained from the City of New York on October 11, 1976, and on November 19, 1976, they were turned over to the VA's handwriting experts for analysis and comparison with the other documents in the case.

On January 11, 1977, the Assistant United States Attorney in charge of the investigation received a letter from defense counsel inquiring into the status of the investigation and stating that he intended to "move to dismiss for failure to prosecute," although no indictment or complaint had then been filed against Rice, a fact known to counsel. On or about the same date, the Assistant U. S. Attorney received the VA's final report setting forth the results of the handwriting analysis. On January 18, 1977, this additional evidence was brought before the grand jury, and after some deliberations as to what charges were warranted, the present indictment naming Rice as the sole defendant was handed down on

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February 16, 1977. Eight days later, on February 24, 1977, at his arraignment in the District Court, Rice pleaded not guilty to the charges contained therein.

Discussion

Defendant's claim insofar as it is based on Rule 48(b), F.R.Crim.P., requires no extended discussion. That Rule provides in relevant part:

"If there is unnecessary delay in presenting the charge to the grand jury or in filing an information against a defendant who has been held to answer to the district court, the court may dismiss the ... indictment, information, or complaint." (Emphasis added)

By its terms, the Rule is clearly limited to post-arrest situations, and is considered to be coterminous with the Sixth Amendment right to a speedy trial. United States v. Marion, 404 U.S. 307, 319 (1971). Where, as here, the indictment was the first formal act in the criminal prosecution of a defendant, Rule 48(b) and the Sixth Amendment do not apply to the period of pre-indictment delay. United States v. Marion, 404 U.S. at 312, n. 4; United States v. Iannelli, 461 F.2d 483, 485 (2d Cir.), cert. denied 409 U.S. 980 (1972). Since Rice was never arrested and since the filing of the indictment initiated the prosecution against him, he may not rely on the provisions of Rule 48(b).

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Rice's claim of pre-indictment delay in violation of the Due Process Clause also must fail. First, it is well established that the statute of limitations is the bulwark protecting potential defendants, and the primary guaranty against bringing stale criminal charges. United States v. Ewell, 383 U.S. 116, 122 (1966); United States v. Capaldo, 402 F.2d 821, 823 (2d Cir. 1968), cert. denied 394 U.S. 989 (1969).

When it appears that the charges were brought within the period provided by the applicable statute of limitations, defendant must establish that pre-indictment delay caused substantial prejudice to his right to a fair trial, and that the delay was an intentional device to gain a tactical advantage over the accused. United States v. Marion, 404 U.S. 307, 325 (1971); United States v. Mejias, Dkt. Nos. 76-1384-1389; 76-1395 at p. 2284 (2d Cir. March 10, 1977). In this case such a showing cannot be made.

Here, the indictment was filed well within five years of the alleged criminal acts. Rice has not shown that he suffered any actual prejudice in preparing his defense to these charges. United States v. Iannelli, 461 F.2d at 485. He does not claim that any witnesses were lost, or that any documents or other evidence helpful to the defense were misplaced during the delay. While it is true that slightly more than one year passed between his grand jury appearance and the filing of the indictment, he

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has not shown that this period of delay has hindered his ability to defend himself.

Rice does claim that the lapse of time lulled him into believing that the Government was no longer interested in his case. This is merely a case of wishful thinking on the part of Rice, a phenomenon not unknown among potential defendants against whom the statute of limitations has not yet run. Certainly no due process claim is made out where a self-generated expectation of not being prosecuted has no legitimate basis in fact, and is not derived from any action or statement by the Government.

The Court finds that the delay here was not unreasonable, and that it was not designed or used by the Government to gain a tactical advantage over the accused. The grand jury's investigation was no doubt lengthened by the need to get expert analyses of the handwriting exemplars and the signature of Rice on the apartment lease. Also, the grand jury had a legitimate interest in hearing the testimony of the witness who, Dothard claimed, would exculpate him. The delay occasioned by both of these matters was thus unavoidable.

Moreover, throughout the investigation, there was a real question as to the precise nature of the crimes, if any, which Rice had committed. While the Government apparently did have sufficient evidence to indict Dothard on March 2, 1976, there was

serious doubt at that time as to whether there was probable cause to believe that Rice had committed a crime. The disappearance of a claim file, while certainly suspicious, may not by itself have been sufficient to justify an indictment. Only after the handwriting analysis was received, and only after Dothard's witness had testified did the pieces begin to fall into place as to Rice. As stated in United States v. Capaldo, 402 F.2d 821, 823 (2d Cir. 1968):

"It is usually in the public interest and frequently to the advantage of the prospective defendant, that charges not be brought until the prosecutor has completed his investigation and feels that there is sufficient likelihood of gaining a conviction."

In light of all the circumstances, the Court believes that the delay in obtaining the indictment was not unreasonably long. Nor is the delay traceable to some purposeful conduct on the part of the Government designed to gain an unfair advantage over Rice. Rather, the time was spent in digging up evidence which the Government had a rational basis for believing would prove incriminating as to Rice. Since there was no contrived procrastination by the Government, and no prejudice to Rice was established, his rights to due process of law were not violated by the delay. United States v. Eucker, 532 F.2d 249, 255 (2d Cir. 1976).

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DEFENDANT } Alphonse Rice } Southern District of New York
DOCKET NO. ➤ 77 Cr. 125CLB

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
6 10 '77

COUNSEL } ☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to
have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
☒ WITH COUNSEL Leonard Levenson
(Name of counsel)

PLEA } ☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☒ NOT GUILTY

There being a ~~finding~~/verdict of { ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

FINDING & JUDGMENT } Defendant has been convicted as charged of the offense(s) of conspiracy to defraud the V.A.
Administration. (Title 18, U.S. Code, § 371.); false statements on
application for V.A. benefits. (Title 18, U.S. Code, § 1001.)

SENTENCE OR PROBATION ORDER } The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary
was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is
hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of
NINE (9) MONTHS on each of counts 1 and 3, to run concurrently with
each other and concurrently with the probation imposed by Judge
Gagliardi.

Defendant continued on present bail pending the posting of bail fixed
for appeal in the amount of \$5,000.00 Unsecured Personal Recognizance
Bond.

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the
reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at
any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke
probation for a violation occurring during the probation period.

COMMITMENT
COMMITMENT } The court orders commitment to the custody of the Attorney General and recommends,
COMMITMENT

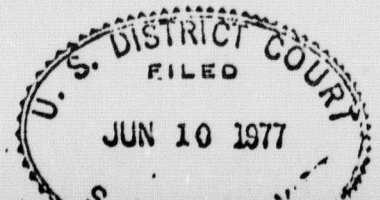
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It is ordered that the Clerk deliver
a certified copy of this judgment
and commitment to the U.S. Mar-
shal or other qualified officer.

FILED BY
U.S. District Judge
U.S. Magistrate

Charles L. Bryant

A-15



E X H I B I T S

15

TYPE OF ACTION			
SINGLE PURPOSE		MULTI-PURPOSE	
DEP CHNG	TRNG TIME CHNG	END DATE CHNG	

X

TYPE OF TRAINING										
FAC	UNDER GRAD	NON DEGREE	VOC-TECH POST HS	OTHER VOC-TECH	HIGH SCHOOL	OUT	FARM COOP	APPR	ELEM	FLIGHT

CERTIFICATE OF ELIGIBILITY DATA						
PROG CHG	FINAL OBJECTIVE	ELIG IND	FACILITY CODE			FAC MOD
			PROFIT TYPE	NAME	STATE	

FILE NUMBER

PAYEE NO

RD NO

25590051

06 5

PRINT NAME BELOW

1ST LTR (FIRST NAME)

L

A B C D E F G H I J K L M

N O P Q R S T U V W X Y Z

1ST LTR (SUR-NAME)

D

A B C D E F G H I J K L M

N O P Q R S T U V W X Y Z

2ND LTR (SUR-NAME)

O

A B C D E F G H I J K L M

N O P Q R S T U V W X Y Z

3RD LTR (SUR-NAME)

T

A B C D E F G H I J K L M

N O P Q R S T U V W X Y Z

CHANGE REASON	DEPENDENCY	TRNG TIME	HOURS TYPE	DAYS PER WEEK	ENT. CHG	BEGINNING DATE			ENDING REASON	ENDING DATE (NO PAY DATE)		
						MONTH	DAY	YEAR		MONTH	DAY	YEAR
26	13	4	12			09	03	74		06	05	76

AWARD DATA

CORRESPONDENCE DATA	TOTAL LESSONS	RATE PER LESSON	TOTAL CHARGES	CHILD BIRTH DATA						
				ACTION	MONTH	BIRTH DATE DAY	YEAR	STATUS		
						1	01	06	71	1
						1	09	16	73	1

ADDITIONAL FLIGHT DATA	FLIGHT CHARGES PAID BY STUDENT	FLIGHT COST CERTIFIED TO DATE	MISC. DATA	ENTITLEMENT CODE	COURSE CODE	ENROL PERIOD	LETTER IND	6 MO STEP OUT/APPR	POWER OF ATTORNEY

RESUBMIT CORR ONLY	ADDR CHANGE IND
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SAMPLE NUMBERS

1234567890X

OVER 8

A-16

SIGNATURE

DATE

SUPPLEMENTAL AWARD CODE SHEET (OCR)

NICE, ALPHEE 283750%

COPY RECEIVED
OCT 13 1977
K. S. A. -
BOLING
ROBERT B. FISKE JR.

EXISTING STOCKS OF VA FORM 2021
SEP 1949. WILL BE USED.

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EXHIBIT No.

DEC 19 1975

U. S. GRAND JURY
S. D. N. Y.